Supreme Court, U.S.
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No. 99-932

In The

Supreme Court of the United States

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY STEARNS and JUDY STEARNS, husband and wife,

Petitioners,

v.

THE CITY OF GIG HARBOR, a Washington municipal corporation,

Respondent.

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,

Petitioners,

v.

THE CITY OF GIG HARBOR, a Washington municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has petitioner Stearns demonstrated that the state statute at issue in this case (RCW 4.84.370) "penalizes" him, or violates the First or Fourteenth Amendment to the U.S. Constitution, if: (a) there is no fundamental right to an appeal; (b) Stearns has had three hearings on the merits of each case and lost in each hearing; (c) the statute is rationally related to a legitimate governmental purpose of discouraging duplicative and meritless appeals; and (d) the statute does not threaten the integrity or independence of the judiciary?

2. Has petitioner Stearns demonstrated that RCW 4.84.370 conflicts with 42 U.S.C. § 1983 and § 1988, if (a) the statute does not require Stearns to join any potential 42 U.S.C. § 1983 and § 1988 claims with a petition to review a governmental land use decision; or if (b) the statute only authorizes an award of fees on appeal of a governmental "land use approval or decision," for the land use portion of the decision?

3. Has petitioner Stearns shown a violation of his constitutional rights by the City's mere filing of a motion (which was later withdrawn) informing Stearns of the existence of a statute that would allow the City to recover its attorneys' fees, and placing Stearns on notice of the City's intent to seek its attorneys' fees under a valid statute?

PARTIES TO THE PROCEEDING

The petitioners are Gig Harbor Marina, Inc., Stanley Stearns and Judy Stearns. For some unexplained reason, petitioners have included another lawsuit in this appeal, involving another party, Arabella's Landing Marina.

The respondent is the City of Gig Harbor, a Washington municipal corporation.

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OPINION BELOW

Stearns appeals from the decision of the Washington Supreme Court in *Gig Harbor Marina, Inc. v City of Gig Harbor,* denying the petition for review. The opinion of the Washington Court of Appeals was not issued on April 21, 1997, as stated by Stearns. Only the published portion of the opinion was provided by Stearns to this Court in their Appendix A. The City has attached a full copy of the Court of Appeals' decision (Div. II, No. 22906-4-II, dated March 26, 1999) as Appendix A. The City believes that this full copy should be reviewed by this Court, as this unpublished version also contains the Washington Court's decision dismissing the third question Stearns has presented for review.

The case attached as Appendix A is only one of Stearns' five pending lawsuits against the City. Stearns has attached a copy of the Court of Appeals' decision in one of these unrelated cases as Appendix C to his Petition for Writ of Certiorari. It has absolutely no relevance to this case, other than the fact that it demonstrates that Stearns does not find the existence of RCW 4.84.370 to "chill" decision to file an appeal of land use decisions after he has lost at every level of appeal.

JURISDICTION

Stearns appeals the constitutionality of RCW 4.84.370 and requests declaratory relief under 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Stearns believes that RCW 4.84.370 is unconstitutional under the First Amendment to the U.S. Constitution, Section 1 of the Fourteenth Amendment of the U.S. Constitution and Section 1983 of the United States Code.

COUNTERSTATEMENT OF THE CASE

One of the development schemes proposed by Stearns for his property involved an application for a site plan and conditional use permit for an office-retail building, a yacht club and an open plaza. The City hearing examiner denied the site plan application because of inadequate on-site parking, but granted the conditional use permit on condition that Stearns provide additional on-site parking. The City Council affirmed the denial of the site plan and reversed the hearing examiner's decision on the conditional use permit, finding that such a permit could not be granted if the site had inadequate parking.

Stearns has made an erroneous statement of the facts on page 3 of his Petition. He claims that "during the review of the Stearns' applications, the City changed its interpretation of the zoning code's parking requirements for the Stearns' proposal." Even if this were true, the City's interpretation is the City's final decision, not a statement made by any City staff member during the application review process.

Stearns appealed the City Council's denial of his applications under the Land Use Petition Act, chapter

36.70C RCW. The Pierce County Superior Court dismissed Stearns' land use petition and all claims against the City with prejudice. The City thereafter filed a motion for calculation of the amount of attorneys' fees and costs to which it would be entitled under RCW 4.84.370. Stearns' objected to the motion claiming it was premature, and that RCW 4.84.370 was unconstitutional. The City withdrew its motion upon Stearns' objection. The Court thereafter allowed Stearns to amend his dismissed petition to add two causes of action for declaratory relief on the constitutionality of RCW 4.84.370, and for an award of attorneys' fees and costs against the City under 42 U.S.C. § 1988 for an alleged violation of civil rights.

The Superior Court denied Stearns' summary judgment motion for declaratory relief, and granted the City's motion to dismiss Stearns' Section 1983 claim, finding that the Section 1983 claim was frivolous and awarding the City its attorney's fees.

Stearns appealed to the Washington Court of Appeals, and on March 26, 1999, the Court issued its decision finding that the City correctly denied the development permits, that RCW 4.84.370 was constitutional, and dismissing Stearns' 42 U.S.C. § 1983 claims.

Declarations of Stanley Stearns and Richard Lindberg.

Stearns makes much of the "chilling effect" of RCW 4.84.370. He submits a declaration to this Court explaining that as a result of the statute, he was discouraged from filing an appeal. However, the facts are completely opposite – after the City Council denied his development applications, he appealed to Pierce County Superior

Court, the Washington Court of Appeals and the Washington Supreme Court. In the unrelated case he has attached as Appendix C to his Petition for Writ of Certiorari, Stearns further demonstrates that he is willing to appeal adverse land use decisions, even when he loses on every level of appeal.

ARGUMENT

THE WASHINGTON COURTS DID NOT ERR IN RULING THAT RCW 4.84.370 IS CONSTITUTIONAL.

1. Stearns bears the burden of proving that RCW 4.84.370 is unconstitutional beyond a reasonable doubt.

Stearns bears the burden of proving that RCW 4.84.370 is unconstitutional beyond a reasonable doubt. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990); *Campos v. Department of Labor & Indus.*, 75 Wn. App. 379, 384, 880 P.2d 543 (1994), *review denied*, 126 Wn.2d 1004 (1995). A statute must be given a construction which preserves its constitutionality if at all possible. *Longview Fibre Co. v. DOE*, 89 Wn.App. 627, 632, 949 P.2d 851 (1998).

2. RCW 4.84.370 does not violate due process because Stearns does not have a fundamental right to appeal, and he has taken advantage of three opportunities to litigate the merits of his case.

Stearns contends that RCW 4.84.370 violates due process. He does not, however, differentiate between procedural and substantive due process, or set out the threshold requirements for either type of claim.

a. Stearns' challenge to RCW 4.84.370 cannot proceed as a substantive due process claim because the statute does not infringe upon a fundamental right, and because there are other more specific Constitutional provisions under which Stearns can seek relief.

Stearns argues that RCW 4.84.370 has no apparent legitimate purpose. If this argument is designed to trigger a substantive due process analysis, it must fail. Recent case law establishes a new test for analyzing substantive due process claims. *Patel v. Penman*, 103 F.3d 868, 874-75 (9th Cir. 1996), *cert. denied*, 520 U.S. 1240, 117 S. Ct. 1845, 137 L. Ed. 2d 1048 (1997); *Armendariz v. Penman*, 75 F.3d 1311, 1318-26 (9th Cir. 1996). Under these cases, substantive due process no longer provides protection against government conduct where such conduct is circumscribed by other more specific provisions of the Constitution. *Armendariz* at 1319. Stearns has asserted that RCW 4.84.370 violates the First Amendment, equal protection and procedural due process. Because these provisions of the Constitution potentially protect Stearns against the alleged harm of RCW 4.84.370, Stearns' claims must be

analyzed under those provisions alone, and not under the more general guarantees of substantive due process. *Armendariz* at 1325-26. Notwithstanding the above, Stearns cannot establish a substantive due process claim. Substantive due process is not implicated unless a fundamental right is involved. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772, 787 (1997). Fundamental rights include those specific freedoms protected by the Bill of Rights, and those rights indispensable to personal liberty such as the right to marry, to have children, and to bodily integrity. *Id.* at 787.

The "rights" asserted by Stearns do not fall in this same category. He claims RCW 4.84.370 impermissibly infringes upon his appeal rights. "Due process does not, however, guarantee a right to appeal." *Ford Motor Co.*, 115 Wn.2d at 569 (citing *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973)). Stearns also complains about the financial "burden" of paying the government's attorneys' fees. Economic interests, however, have far less constitutional significance than fundamental rights. *Ortwein*, 410 U.S. at 659; *United States v. Kras*, 409 U.S. 434, 444-46, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).

b. Stearns cannot establish a procedural due process claim because he has already had three hearings on the merits.

Stearns suggests that RCW 4.84.370 violates due process because it insulates government land use decisions from judicial review. Stearns' argument is baseless because he has already had his day in court. Due process

requires that deprivation of life, liberty or property be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994). The degree of protection depends upon the nature of the interest affected. *Haygood v. Younger*, 769 F.2d 1350, 1355 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

Stearns has received the degree of protection he deserves. Stearns has already had three hearings on the merits of his claim; one with the Hearing Examiner, another with the City Council, and a third in Superior Court. Due process does not require that a plaintiff have an appeal where at least one hearing has already been held. *Ortwein*, 410 U.S. at 659-60.

The Washington Courts previously determined that an attorneys' fees statute similar to RCW 4.84.370 did not violate due process. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 800 P.2d 367 (1990). In that case, the Court upheld provisions of the Lemon Law Act allowing prevailing consumers, but not prevailing manufacturers, to recover attorneys' fees incurred on appeal. *Id.* at 570. Like Stearns, the manufacturers argued that the attorneys' fee provision "burdened" their right to appeal and their right of access to the courts. *Id.* at 569. The Court rejected these arguments, concluding that the legislature may make rules concerning the type of damages recoverable and the manner in which damages are paid. *Id.* at 570.

3. RCW 4.84.370 has not violated Stearns' First Amendment right to petition the government for redress of grievances because it has not obstructed his access to the courts.

Stearns contends that RCW 4.84.370 violates his First Amendment right to petition the government for redress of grievances. He argues that litigation is a protected form of speech, and that RCW 4.84.370 exacts an unconstitutional penalty on such speech. Stearns presses this point even though he has litigated the merits of his case at the administrative and judicial levels.

The right to petition the government for redress of grievances is a First Amendment right that protects collective activity taken to achieve meaningful access to the courts. *In re Primus*, 436 U.S. 412, 426, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978). This right is not absolute. *Filan v. Martin*, 38 Wn. App. 91, 97, 684 P.2d 769 (1984). Stearns' First Amendment claim must fail for the simple reason that he has already had meaningful access to the courts.

There is no merit to Stearns' contention that RCW 4.84.370 "penalizes" his right of access to the courts. The statute has no operative effect until the litigant loses at the administrative, superior court, and appellate levels. RCW 4.84.370. The statute did nothing to stop Stearns from filing his land use petition, pursuing his claims in court, or filing this appeal.

The fact that attorneys' fees have not been imposed against Stearns under RCW 4.84.370 – and may never be imposed – is further justification for dismissing Stearns' First Amendment claims. In *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954), the Supreme

Court refused to consider a First Amendment attack on the constitutionality of a penalty provision within the Federal Regulation of Lobbying Act that prohibited convicted persons from engaging in lobbying activities for three years from the date of conviction. *Id.* at 626-27. The appellees argued that the penalty provision violated their right to petition the government. *Id.* at 627. The Court found it "unnecessary" to pass on this contention: "Unlike [other provisions of the Lobbying Act, the penalty provision] has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them." *Id.*

4. RCW 4.84.370 does not violate equal protection because it does not infringe upon a fundamental right, and because it is rationally related to a legitimate governmental purpose.

Stearns claims that RCW 4.84.370 violates equal protection because "it imposes a penalty which operates only against non-governmental litigants in land use cases." AB at 16. Stearns misreads the statute. The City has thought of at least one situation, and there may be others, where a litigant can use RCW 4.84.370 against a local government.

Take the example where a county hearing examiner issues a land use permit with three conditions, and the applicant appeals the authority of the hearing examiner to impose the conditions. On appeal, the county council overturns two of the three conditions, but affirms the third. Under these circumstances, the applicant could in good faith argue that it is the "substantially prevailing" party at the local level. Assume that the applicant then

appeals the imposition of the third condition to superior court and wins that appeal. The applicant is then the "prevailing party" at the superior court level. Finally, if the county were then to appeal reversal of the third condition, but lose, the applicant would be the prevailing party in the court of appeals. In this hypothetical, the applicant is the prevailing or substantially prevailing party at each stage of the proceedings, and a court could find that the applicant is entitled to an award of attorneys' fees from the county under RCW 4.84.370.

Even if we assume that RCW 4.84.370 creates the classification suggested by Stearns, the statute does not violate equal protection. The first step in equal protection analysis is to determine the proper standard of review against which to test the challenged legislation. *Seeley v. State*, 132 Wn.2d 776, 791, 940 P.2d 604 (1997). When a statute does not burden a fundamental right or target a suspect class, the reviewing court will uphold the statute so long as it bears a rational relation to some legitimate end. *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834, 841 (1997).

Rational basis review is the proper standard against which RCW 4.84.370 should be measured. Stearns has not argued, and there is no proof, that he is a member of a suspect class. Stearns has also failed to show that RCW 4.84.370 implicates any fundamental rights. The "right" or "interest" allegedly infringed upon by the statute is Stearns' desire to appeal without the risk of having to pay the City's attorneys' fees. Stearns' economic interests have "far less constitutional significance" than traditional fundamental interests. *Ortwein*, 510 U.S. at 659.

The rational basis test only requires that any classification created by the statute bear a rational relation to a legitimate state interest. *Vacco*, 138 L. Ed. 2d at 841. Stearns bears the burden of proving that the alleged classification created by RCW 4.84.370 lacks any rational basis and is "purely arbitrary." *Seattle v. Fontanilla*, 128 Wn.2d 492, 505, 909 P.2d 1294 (1996); *Seattle School Dist. No. 1 v. Department of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991).

Stearns falls well short of meeting his burden of proof. Stearns identifies "unsuccessful land use appellants" as the class of people singled out by the statute. He contends that this classification is based on an improper purpose to "shield government from having its exercise of power over private land from being reviewed by an appellate court." The legislature has wide discretion in creating classifications, *Seattle School Dist.*, 116 Wn.2d at 362, and a classification must be "purely arbitrary" to overcome the strong presumption of constitutionality, *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 186, 931 P.2d 208, *review denied*, 132 Wn.2d 1010 (1997). "If the court can reasonably conceive any state of facts which will sustain the classification, it will be sustained." *Seattle School Dist.*, 116 Wn.2d at 362-63.

Shifting a degree of risk to land use litigants makes sense when we consider the standards of review applicable to land use decisions. Under LUPA, the superior court reviews the decision de novo, that is, the court looks to the administrative record to determine whether the land use decision is supported by substantial evidence. RCW 36.70C.130(1). Appellate courts also review the land use

decision on the administrative record, not on the record created in superior court. *King County v. Boundary Review Board*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993). Without RCW 4.84.370, there is little to discourage land use litigants from abusing the appellate process, and seeking duplicative judicial review of the same land use decision. RCW 4.84.370 attempts to stem such abuse by striking a balance between protecting legitimate claims and discouraging meritless ones. It is certainly rational and legitimate for the legislature to enact legislation to discourage meritless appeals and protect the limited resources of local governments and the judicial system.

Equal protection arguments nearly identical to those raised by Stearns have been considered and rejected by this Court. In the recent *Ford Motor Co. v. Barrett* decision, the Court determined that a fee-shifting statute allowing prevailing consumers but not prevailing manufacturers to recover attorneys' fees incurred in appealing a decision of the motor vehicle arbitration board did not violate equal protection. 115 Wn.2d at 567-68. Ford, like Stearns in this case, argued that the attorneys' fee provision violated equal protection by "singling out a class of litigants and subjecting them to onerous penalties as a condition of seeking redress within the court system." *Id.* at 561. Ford also argued that the practical effect of the statute was to allow only consumers to appeal without risk, and that the fee-shifting statute burdened its fundamental right of access to the courts by restricting its right to appeal. *Id.* Finding these claims to be without merit, the Court concluded that Ford did not meet its burden of demonstrating the statute unconstitutional beyond a reasonable doubt. *Id.* at 567-68.

5. RCW 4.84.370 does not violate the separation of powers doctrine because it is a legitimate exercise of legislative power.

Stearns contends that RCW 4.84.370 frustrates the constitutional powers of the state courts delegated by Article 4, § 1 of the Washington Constitution. His argument presupposes that state courts have the exclusive authority to define a person's right to recover attorneys' fees. To the contrary, it is the legislature, not the courts, that possesses this power. "[T]he allowance of attorney fees as part of the costs of an action is dependent upon statutory authority expressly conferring the power to allow them." *First Federal Savings & Loan Ass'n v. West Richland,* 39 Wn. App. 401, 408, 693 P.2d 171 (1985). A judicial invalidation of RCW 4.84.370 is more likely to upset the balance of powers than affirmance of the statute. Any classifications drawn by the statute demonstrate a legislative policy choice which rightfully belongs with the legislature and not this Court.

Stearns completely mischaracterizes RCW 4.84.370 when he states that it shields local government from appellate review. That is far from the truth. The statute does nothing to prevent appellate review. It does not prohibit the filing of an appeal or require a land use litigant to pay an exorbitant fee prior to having its case heard on the merits. Land use litigants with legitimate claims will not be deterred from seeking appellate review. It is only those litigants with meritless claims, who have already lost at the administrative and judicial levels, that face the risk of paying local government's attorneys' fees on appeal.

Stearns' separation of powers claim demonstrates a fundamental misunderstanding of the relationship between the legislature and the judiciary. The legislature has the power to change substantive law, and may create or even abolish causes of action. *Suburban Fuel Co. v. Lamoreaux*, 4 Wn. App. 179, 181, 480 P.2d 216 (1971). Accordingly, the enactment of an attorneys' fees statute is a legitimate exercise of legislative power and does not impair recognized judicial powers.

6. Neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1988 preempts RCW 4.84.370 because there is no conflict between federal civil rights legislation and state land use laws.

Stearns contends that RCW 4.84.370 conflicts with the Civil Rights Act, and is therefore preempted. Stearns plays up this alleged "conflict" by noting that land use claims are often paired with civil rights claims. AB at 22. Stearns' mistakenly assumes that the state and federal statutes apply to the same activity.

The Civil Rights Act and RCW 4.84.370 serve completely different purposes. Section 1983 provides a mechanism for persons to challenge government conduct violative of a federal constitutional or statutory right. 42 U.S.C. § 1983; *see also Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369 (1997). 42 U.S.C. § 1988 ("Section 1988") provides for an award of reasonable attorneys' fees and costs to the prevailing party in a Section 1983 action. 42 U.S.C. § 1988. These statutes do not provide a mechanism for persons to obtain judicial review of local government land use decisions.

RCW 4.84.370, on the other hand, applies in land use cases, not civil rights cases. The statute's scope is limited to cases where a land use applicant challenges a local land use decision. RCW 4.84.370. The statute does nothing to impede any rights or procedures created by the Civil Rights Act.

Absent any overlap in the state and federal schemes, there can be no conflict warranting preemption. The test for preemption is as follows:

> Preemption may occur if (1) Congress passes a statute that expressly preempts state law, (2) Congress occupies the entire field of regulations, or (3) state law conflicts with federal law, making compliance with both an impossibility or state law presents an obstacle to the accomplishment of the federal purpose.

Stevedoring Servs. of Am. v. Eggert, 129 Wn.2d 17, 23, 914 P.2d 737 (1996). Stearns has not alleged that the Civil Rights Act expressly preempts state land use regulations, or that Congress has occupied the entire field of land use law. Stearns' only argument is that RCW 4.84.370 "conflicts" with the "remedial objectives" of the Civil Rights Act. AB at 23-24.

Stearns has clearly failed to show that it is "physically impossible" to comply with both RCW 4.84.370 and the Civil Rights Act. The state and federal statutes cover completely different subjects. One is designed to protect against unconstitutional governmental conduct, wherever it occurs, and the other only applies in land use cases. The fact that land use claims can sometimes be joined with civil rights claims does not prove that the statutes conflict. Section 1983 and Section 1988 do not even come

into play in land use cases where there is no allegation of unconstitutional governmental conduct.

STEARNS HAS NOT SHOWN THAT THE WASHINGTON COURT'S DENIAL OF HIS CLAIM FOR DECLARATORY RELIEF UNDER 42 U.S.C. § 1983 SATISFIES THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

Stearns contends that the City's filing of its Motion for Calculation of Attorneys' Fees Under RCW 4.84.370 violated his constitutional rights, entitling him to attorneys' fees and costs under Section 1988. There is absolutely no merit to this argument. The City never sought an actual award of attorneys' fees under the statute, and immediately withdrew the motion when Stearns objected. The filing of the motion was no more harmful to Stearns than if the City had filed an answer requesting its attorneys' fees and costs under the statute. Viewing the evidence in the light most favorable to Stearns, the Superior Court nonetheless found the Section 1983 claim to be frivolous.

In order to establish a cause of action under Section 1983, Stearns must show (1) that the City violated a federal constitutional or statutory right, and (2) that the City was acting under color of state law. *Kalmas*, 133 Wn.2d at 215. To obtain an award of attorneys' fees against the City, Stearns must also show that his alleged constitutional injury was proximately caused by an act or omission of the City. *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir. 1994).

When measured against these threshold requirements, it is obvious that Stearns has not met his burden of proof. Stearns has not proven that RCW 4.84.370 violates any of his constitutional rights. *See* discussion *infra* part II.B. He has also failed to explain how the City can be the target of a Section 1983 action for bringing a motion under the authority of a constitutional statute.

Stearns claims that the City Attorney "chilled" his right to appeal by putting him on notice that she would be requesting reimbursement of the City's attorneys' fees under RCW 4.84.370. Stearns attempts to provide proof of such "chilling" effect in the form of a Declaration of Richard Lindberg, and a Declaration of Stanley Stearns. Mr. Lindberg is not an attorney for Stearns, and is not a party to this action. His independent experience with RCW 4.84.370 as a representative of a neighborhood association in Kitsap County makes it clear that if there is any "chilling" effect associated with the statute, it is caused by the statute itself, not by any action of the City Attorney. Similarly, if Stanley Stearns' declaration proves anything, it is that the existence of RCW 4.84.370, not any actions of the City Attorney, have forced him to think twice before appealing. The source of Stearns' "chill" is obviously RCW 4.84.370, not the City Attorney's act of putting him on notice of the statute.

It is incomprehensible how the City can be subject to a Section 1983 action under these facts. Notifying Stearns that the City would seek reimbursement of its attorneys' fees under a valid statute was no different than if the City had filed an answer requesting the same relief. In addition, the City never sought – and may never obtain – an award of attorneys' fees under the statute. Any injury to

Stearns is the result of RCW 4.84.370, not the acts or omissions of the City Attorney.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court deny Stearns' petition for a writ of certiorari.

DATED this 3rd day of January, 2000.

Respectfully submitted,

LAW OFFICE OF CAROL A. MORRIS, P.C.
CAROL A. MORRIS, WSBA #19241
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY STEARNS and JUDY STEARNS, husband and wife, Appellants, v. CITY OF GIG HARBOR, a municipal corporation, Respondent.	No. 22906-4-II. PUBLISHED OPINION (Filed March 26, 1999)

ARMSTRONG, J. – The City of Gig Harbor denied the Stearnses' proposed development of property. The Stearnses appealed to the superior court and joined a 42 U.S.C. § 1983 claim alleging the City violated their civil rights. The superior court affirmed the City's denial of the development, dismissed the § 1983 action and, finding the § 1983 action frivolous, awarded attorney's fees to the City. The Stearnses filed this appeal and the City now seeks attorney's fees under RCW 4.84.370, which allows attorney's fees in land use cases to petitioners who have substantially prevailed in front of the local government, the trial court, and the appellate court. The Stearnses contend that RCW 4.84.370 violates equal protection, due process, free speech, and the right to redress grievances. The Stearnses also challenge the dismissal of their 42

U.S.C. § 1983 claim and the trial court's finding that such claim was frivolous. Finally, the Stearnses contend that Gig Harbor misapplied its own ordinances concerning parking space requirements, permitted usage, and height requirements. We hold the statute constitutional as applied here. But we reverse the award of attorney's fees based upon bringing a frivolous action. Otherwise, we affirm the trial court.

FACTS

Stanley and Judy Stearns own four and one-half lots in the City of Gig Harbor on which they operate a marina, Gig Harbor Marina, Inc., known as Arabella's Landing. These lots, zoned "Waterfront Millville," are currently developed with a marina service building, a duplex, and a single-family residence.

The Stearnses proposed to develop the site further with an office-retail building, a yacht club, and an open plaza. The Stearnses applied for site plan approval and for a conditional-use permit, which was required to develop the yacht club. The hearing examiner denied site plan approval because of inadequate on-site parking, but granted a conditional-use permit on condition the Stearnses provide additional parking. The Stearnses contested the City's method of calculating the parking, arguing that the City was misinterpreting its code. Under the Stearnses' interpretation of the code, the site had adequate parking.

The Gig Harbor City Council affirmed the site plan denial because of the parking inadequacy. In addition, the council found "the site plan is not consistent with the

City's comprehensive plan," the proposed use was not "medium usage," and the proposed building did not comply with height restrictions in the Waterfront Millville zone. The city council reversed the grant of the conditional-use permit, finding that such a permit could not be granted if the site had inadequate parking.

The Stearnses filed a Land Use Petition in Pierce County Superior Court under the Land Use Petition Act (LUPA), RCW 36.70C. In July 1996, the trial court affirmed Gig Harbor's land use decisions and dismissed the Stearnses' petition.

Seven days after the petition was dismissed, the City filed a "Motion for Calculation of Attorneys' Fees Under RCW 4.84.370." The City asked the court to "calculate the amount of attorneys' fees that the City would be entitled to under RCW 4.84.370,[1] in the event this action is

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[1] RCW 4.84.370 provides:

Appeal of land use decisions – Fees and costs. (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a

appealed and the City prevails on appeal." The City further stated that "a ruling at this time would simplify the issues on appeal and clarify the financial risks facing each party." The City accompanied this motion with two affidavits of counsel justifying $11,712 in attorney's fees.

After the Stearnses opposed the motion, the City withdrew it. The Stearnses then moved to amend their petition to add § 1983 claims; they alleged that the City had used the "motion to calculate attorney's fees under RCW 4.84.370" as a threat to deter the Stearnses' appeal of the Land Use Petition. The Stearnses contended that the statute was unconstitutional and that their proposed amendment sought a declaration of the rights and duties of the parties. The trial court allowed the amendment.

The Stearnses moved for summary judgment, and the City countered with a "Motion to Dismiss Damage Claims Under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 With Prejudice." The trial court denied the Stearnses' motion for summary judgment, granted the City's motion to dismiss, and found that the § 1983 claims were frivolous.

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substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline(s) hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

The City subsequently moved for attorney's fees under 42 U.S.C. § 1988, RCW 4.84.185, and CR 11; the trial court awarded $5,773.80 in fees against the Stearnses and their attorneys.

ANALYSIS

The City first contends that the constitutional issues are not ripe because no attorney's fees have been assessed against the Stearnses under RCW 4.84.370. The argument lacks merit. In both actions[2] pending before this court involving the Stearnses and the City, the City has requested attorney's fees on appeal on the basis of RCW 4.84.370. This raises the question of whether the statute is constitutional.

A. Is RCW 4.84.370 Constitutional?

The Stearnses' constitutional challenges to the statute rest upon two propositions: (1) the burden created by the statute is not carried equally by all litigants in land use cases, but only by those who challenge a local government's land use decision; and (2) while not absolutely denying the right to appeal, the statute chills the exercise of such right.

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[2] The other action filed in this court is *Stearns v. City of Gig Harbor*, No. 22912-9-II (March 26, 1999).

1. Equal Protection

a. *Standard of Review*

The legislative classification here defines a party's liability for the attorney's fees and costs of the opposing party on appeal of a local land use decision. A party who prevails or substantially prevails is entitled to fees and costs, and the statute defines the concept of "prevailing party." Assuming the statute creates a classification that treats members of the same class differently, such classification "neither involves suspect criteria (race, religion, national origin, alienage, gender) nor affects fundamental interests ([e.g.], free speech, privacy, voting rights), [and] the court will engage in only minimum scrutiny of the enactments[.]" *American Network, Inc. v. Utilities and Transp. Comm'n*, 113 Wn.2d 59, 77-78, 776 P.2d 950 (1989) (citation omitted) (footnote omitted). Statutes that regulate business and economic activities "carry a strong presumption of constitutionality." *American Network*, 113 Wn.2d at 78, 776 P.2d 950. And we will uphold such statutes if the classification created bears any rational relation to a legitimate state interest. *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997). Stated slightly differently, such a classification will be upheld " 'unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.' " *State v. Coria*, 120 Wn.2d 156, 171. 839 P.2d 890 (1992) (quoting *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990)).

b. *Burden of Proof*

The party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990). The Stearnses thus bear the burden of proving all the elements of an equal protection violation. Initially, the Stearnses must show that the statute fails to afford like treatment to "persons similarly situated with respect to a legitimate purpose of the law. . . . " *Coria*, 120 Wn.2d at 169 (citing *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). Next, if the Stearnses can show such disparate treatment, they must demonstrate that the difference lacks any rational basis and is " 'purely arbitrary.' " *Coria*, 120 Wn.2d at 172 (quoting *Omega Nat'l Ins.*, 115 Wn.2d at 431).

c. *Does the Statute Benefit Only One Class of Litigants, i.e., Local Government?*

The statute is neutral on its face, i.e., it does not say that only local governments can recover fees on appeal. But not all facially neutral statutes are neutral in their application; some legislation denies equal protection by the manner in which it is applied. *See* 2 RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.4, at 344 (1986). Examples of "as-applied" challenges are *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (challenge to a facially neutral zoning decision), and *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976) (challenge to facially neutral police screening exam).

Stearnses contend that not all parties who appeal land use decisions are afforded like treatment under the statute. The Stearnses argue that because the government is both decision-maker and party at the local level, it will never appeal its own land use decision, and so, the government will never be the losing party at the first level. Thus, the Stearnses conclude, the government will never be assessed fees and costs under the statute because it will never lose at all levels.

But the Stearnses' argument rests upon an assumption not demonstrated by this record: that even assuming the City will never appeal its own decision, it is necessarily the prevailing or substantially prevailing party at the local level. The City poses an illustrative hypothetical. Suppose a city hearings examiner approves a proposed development, attaching three or more conditions. The developer appeals to the city council, which strikes all but one of the conditions; unless the stricken conditions were minor, the developer would have substantially prevailed in proceedings before the City. Then suppose the developer appeals the remaining condition to superior court, which strikes it; the developer would be the prevailing party in that judicial proceeding as well. Finally, suppose the City appeals the superior court's decision to the Court of Appeals, which affirms the trial court. The developer would be the substantially prevailing or prevailing party before the appellate court, the trial court, and the City and thus, the developer, not the City, would be entitled to attorney's fees and costs under the statute.

This construction is supported by paragraph (2) of the statute, which provides: "In addition to the prevailing party under subsection (1) of this section, the county, city,

or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal." RCW 4.84.370(2).

Under the hypothetical, a developer who improved his or her position from the hearing examiner to the city council, but then failed to improve through the superior court and appellate court could argue under subsection (1) that the City is not entitled to fees because the developer prevailed at the city level. But subsection (2) makes clear that under these circumstances, the City is entitled to fees. A necessary corollary is that a developer who improves its position from the hearing examiner to the city council can in some situations be considered to have prevailed or substantially prevailed. If the City were always the prevailing party at the council level, subsection (2) would not be necessary.

We conclude that the Stearnses have failed to carry their burden of showing that the statute, as applied, discriminates against land use applicants. Therefore, we need not engage in further equal protection analysis.

2. Due Process/ First Amendment Right to Petition

The First Amendment includes the right to petition the government for redress of grievances. The Stearnses argue correctly that this right includes meaningful access to the courts. *In re Primus*, 436 U.S. 412, 426, 98 S. Ct. 1893, 56 L.Ed.2d 417 (1978); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972). Then the Stearnses argue that, because RCW 4.84.370 permits an award of attorney's fees to the government as prevailing party in a land use

case but not to an applicant, the statute denies due process of law to applicants and impermissibly "chills" their First Amendment rights. As discussed above, this argument assumes a false premise – that an applicant can never qualify for attorney's fees as a prevailing party.

In any event, the statute does not keep an applicant from obtaining meaningful judicial review of a land use decision. The Stearnses went to superior court to challenge the City's denial of their development permit. And not all superior court decisions entitle the losing party to higher judicial review. For instance, the Rules of Appellate Procedure allow only discretionary review of superior court decisions in cases originating in the courts of limited jurisdiction. RAP 2.3(d). *See City of Seattle v. Hesler*, 98 Wn.2d 73, 653 P.2d 631 (1982). Likewise, in most cases, review by the Supreme Court is only at that court's discretion. RAP 4.2.

Other statutes and court rules also permit an award of attorney's fees and costs against a party who pursues an appeal beyond a certain level. *See, e.g.*, MAR 7.3 (party who appeals arbitration award and fails to improve position is liable for reasonable attorney's fees); RAP 18.9(a) (sanctions for frivolous appeal); RCW 10.73.160 (appellate costs, including fee for court-appointed counsel, assessed against adult or juvenile criminal who does not prevail on appeal).

And due process does not guarantee the right to appeal. *Ford Motor*, 115 Wn.2d at 562. Rather, the State may impose a risk of attorney's fees beyond a certain level in the judicial process where "the balance of state and private interests favors the government scheme."

Ford Motor, 115 Wn.2d at 569 (citation omitted). Here, the Legislature has determined that to discourage meritless appeals, a party appealing a land use decision beyond the superior court risks paying an opponent's fees. Given the strong presumption of constitutionality where a statute regulating economic matters is challenged on equal protection or due process grounds, we hold that the balance here favors the government scheme. RCW 4.84.370 does not unconstitutionally deny access to the courts.

3. Separation of Powers

The gist of this argument is that by enacting this attorney's fee statute, the Legislature has burdened and frustrated the judiciary's power of judicial review because only those who can afford the other side's attorney's fees will appeal local land use decisions. This ignores the longstanding rule in this state that a party can recover attorney's fees only when authorized by *statute*, contract, or recognized ground in equity. And the Legislature has enacted many statutes that authorize the recovery of attorney's fees. This is a common legislative function, not the province of the courts.

Moreover, the Stearnses have not demonstrated how the statute affects the powers of the court. While the statute may "chill" some cases in which the courts might overturn the actions of local government, the Stearnses have not cited a single case as to how this interferes with the powers of the judiciary. In those cases that reach the court, the court's powers are unchanged.

B. Conflict with 42 U.S.C. § 1983 and 42 U.S.C. § 1988

The Stearnses contend that RCW 4.84.370 conflicts with, and is thus preempted by, 42 U.S.C. § 1983 and § 1988. These latter statutes provide a cause of action for the violation of federal constitutional and statutory rights, and for attorney's fees to the prevailing party. Because civil rights claims often accompany, or are part of, land use petitions, the Stearnses contend that the statutes conflict.

"Preemption may occur if (1) Congress passes a statute that expressly preempts state law, (2) Congress occupies the entire field of regulations, or (3) state law conflicts with federal law, making compliance with both an impossibility or state law presents an obstacle to the accomplishment of a federal purpose." *Stevedoring Servs. of Am. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (citation omitted). The Stearnses have not claimed that § 1983 or § 1988 expressly preempts RCW 4.84.370, or that Congress occupied the entire field of land use law. Rather, the Stearnses' claim that RCW 4.84.370 presents an obstacle to the accomplishment of a federal purpose.[3]

The Stearnses cite *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123, (1988), in which the United States Supreme Court invalidated a statute requiring litigants to file a claim against a local government before

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[3] Section 1983 and § 1988 will never apply in the same case as RCW 4.84.370 because by definition the government would have to lose litigation to be susceptible to attorney's fees under § 1988, while the government must win litigation to receive attorney's fees under RCW 4.84.370.

litigating any claim against the government, including § 1983 claims. Litigants who did not file such a claim in the proscribed time period were barred from filing suit. *Felder* is distinguishable. There, the statute barred the claim. Here, the statute does not bar an appeal past the superior court; it only imposes fees on an appellant who is unsuccessful for the third time.

The Stearnses contend that the "chilling effect" of RCW 4.84.370 will deter people from bringing the takings claims[4] that accompany land use petitions. This potential "chilling effect" was of concern to the United States Supreme Court when it limited the attorney's fees defendants could recover under § 1983 and § 1988 to those suits where the plaintiff's claims were "frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)).

The Court held that:

> "To take the further step of assessing attorneys fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII."

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[4] A takings claim is a claim that the government has taken private property for public use without paying just compensation. U.S. CONST., amend. V.

Hughes, 449 U.S. at 14-15 (quoting *Christiansburg Garment*, 434 U.S. at 422).[5]

But a land use applicant is not required to join any potential § 1983 and § 1988 claims with a petition to review a governmental land use decision. Such claims may be brought in a separate action not subject to the fees provision of RCW 4.84.370. Further, even if the claims are joined, RCW 4.84.370 authorizes an award of fees on appeal only of a governmental "land use approval or decision." Thus, where a land use petition is joined with § 1983 or § 1988 claims, attorney's fees can be awarded under RCW 4.84.370 only for the land use portion of the action.

In conclusion, the Stearnses have failed to show that RCW 4.84.370 is unconstitutional as applied. The City is entitled to reasonable attorney's fees incurred after the appeal from the superior court.[6]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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[5] While *Christiansburg* dealt with Title VII of the Civil Rights Act of 1964, the case citing it, *Hughes v. Rowe*, adopted the same standard for § 1983 and § 1988, expressing identical concerns. *Hughes v. Rowe*, 449 U.S. 5, 14-15, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980).

[6] We have recently held that RCW 4.84.370 only provides for an award of attorney's fees incurred before the Court of Appeals or the Supreme Court. *Baker v. Tri Mountain*, No. 20905-5-II (filed March 22, 1999).

C. The § 1983 Claims

On the City's motion, the trial court dismissed the Stearnses' claim for declaratory relief under § 1983. The court also found the action frivolous and awarded attorney's fees to the City under 42 U.S.C. § 1988, RCW 4.84.185, and CR 11.

To establish a claim under § 1983, the Stearnses had to show that the city (1) "violated a federal constitutional or statutory right," and (2) in doing so, the City was "act[ing] under color of state law." *Kalmas v. Wagner,* 133 Wn.2d 210, 215, 943 P.2d 1369 (1997) (citing *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 11, 82 P.2d 765 (1992)). As we have discussed, RCW 4.84.370 is constitutional. It follows that the Stearnses' § 1983 claim fails to the extent that it was based upon the City's use of an unconstitutional statute. But the Stearnses also argue their § 1983 claim can be supported by the city's use of a constitutional statute in an improper manner, citing *Greenwich Citizens Comm., Inc. v. Counties of Warren and Wash. Indus. Dev. Agency,* 77 F.3d 26 (2nd Cir. 1996)

But we need not address the arguments because the Stearnses have, with this opinion, received the relief they sought. The Stearnses' § 1983 claim asked for a declaration that RCW 4.84.370 was unconstitutional and a declaration of their rights under the statute. The Stearnses did not ask for damages. We have held the statute constitutional. And the Stearnses' rights and duties under the statute, within the context of this case, flow from our

decision and the terms of the statute. In short, whether the trial court erred in dismissing the action is of no consequence. We have granted the Stearnses the relief they sought.

D. Attorney's Fees for Frivolous Claim

Whether a particular claim is frivolous lies within the discretion of the trial court. But if the lawsuit is not frivolous as a whole, attorney's fees cannot be awarded under RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129, 136, 830 P.2d 350 (1992). The substantive claims regarding the constitutionality of RCW 4.84.370 were not found to be frivolous, only the § 1983 claim based upon the City's motion to calculate fees under RCW 4.84.370. Therefore the award of fees under RCW 4.84.185 was unwarranted.

Under CR 11:

> A " 'pleading, motion or legal memorandum' may be subject to CR 11 sanctions if it is both (1) 'baseless' and (2) signed without reasonable inquiry." A filing is "baseless" if (a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.

Blair v. GIM Corp., Inc., 88 Wn. App. 475, 482-83, 945 P.2d 1149 (1997) (citations omitted).

Under § 1988, attorney's fees can be awarded against a plaintiff only if his claims are "frivolous, unreasonable, or without foundation." *Hughes*, 449 U.S. at 14 (citing *Christiansburg Garment*, 434 U.S. at 422).

The trial court, apparently viewing the Stearnses' § 1983 action as one for damages, dismissed the § 1983 action because the Stearnses had not shown that (1) the City violated their constitutional rights, (2) the City's motion to calculate attorney's fees was not a proximate cause of injury to the Stearnses, and (3) the City was immune from liability. We agree that the Stearnses failed to show that the City violated a constitutional right, but the remaining two reasons fail because the Stearnses were not seeking damages. Rather, the Stearnses sought a declaration of the rights and duties of the parties under RCW 4.84.370. Whether the City's motion was a proximate cause of damage to the Stearnses was simply not an issue. Similarly, whether the City was immune from a damage claim under § 1983 was not an issue. Thus, the sole reason supporting dismissal of the § 1983 claim was the Stearnses' failure to show a violation of a constitutional right. The trial court did not find this issue to be frivolous and we agree. *Tiger Oil Corp. v. Department of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997) ("A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.") Accordingly, the award of attorney's fees against the Stearnses must be reversed.

E. Parking Requirements

Turning to the merits of the underlying land use appeal, the Stearnses contend that the City misapplied its ordinances governing parking. The standard of review of the interpretation of a statute under LUPA is apparently "de novo under the contrary to law standard." *Freeburg v.*

City of Seattle, 71 Wn. App. 367, 371, 859 P.2d 610 (1993).[7] RCW 36.70C.130, the statute governing "standards for granting relief" under LUPA, provides that:

> The court may grant relief only if the party seeking relief has carried the burden of establishing that. . . .
>
> . . . .
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> . . . .
>
> (d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1)

Gig Harbor Municipal Code (GHMC) § 17.72.030(Q)(4), which governs general parking requirements for "marinas, moorages, and docks," provides: "If commercial or residential development is to be combined with a watercraft usage requiring parking, the usage which generates the larger number of spaces shall satisfy the requirements of the other usage[.]"

The other relevant ordinance is the parking provision specific to the Waterfront Millville zone in which the proposed development is located. GHMC § 17.48.070,

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[7] The parties agree that this is the appropriate standard, but the cases they cite deal with review under the old writ of cert system. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993) and *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 29 n.3, 891 P.2d 29 (1995).

provides: "Parking and loading facilities on private property shall be provided in accordance with the requirements of Chapter 17.72 GHMC, *except that where there are properties serving multiple uses, parking shall be provided for the combined total of the individual uses.*" (Emphasis added.)

The Stearnses calculate the parking spaces required as:

Marina with Yacht club	41
Retail/professional complex	15
Duplex	4
House	2
TOTAL	62

Gig Harbor calculates the spaces as:[8]

Marina	41
Yacht Club	30
Retail/professional complex	15
Duplex:	4
House:	2
TOTAL	92

This dispute is whether the parking requirements should be calculated under the general parking ordinance for marinas ("commercial . . . development . . . combined with a watercraft usage requiring parking"), which would allow the parking for the marina to satisfy the

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[8] While these figures are taken from the Appellants' brief, the City and the Appellants agree on the method of determining the number of spaces required for each separate structure or use on the property. They disagree over whether the parking that would be required for the Yacht Club under a "straight" square-footage calculation can be rolled-into the existing Marina parking under the GHMC.

parking for the Yacht Club, or under the Waterfront Millville specific ordinance, which would require separate parking for the Yacht Club.

The Stearnses contend that "the reference in GHMC 17.48.070 to *multiple uses* applies to situations where more than one of the *code defined uses* set forth in GHMC 17.72.030(A) through (T) are served by a single property." The Stearnses then argue that the "marina combined with commercial . . . development [Yacht Club]" is recognized as an "individual use" in 17.72.030(Q)(4), and therefore the proposed development does not comprise "multiple uses" under GHMC 17.48.070.

The City counters that the term "multiple uses" in GHMC 17.48.070 which is not defined elsewhere in the code, has a plain meaning contrary to the Stearnses' interpretation. A yacht club is not the same "use" as a marina. And since the Waterfront Millville-specific ordinance was passed at a later date than the earlier general parking ordinance, GHMC 17.48.070 controls. *See State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992) ("[W]hen two statutory provisions dealing with the same subject matter are in conflict, the latest enacted provision prevails when it is more specific than its predecessor.")

We find the City's interpretation persuasive. The Stearnses have cited nothing in the Gig Harbor code to show that the phrase "multiple uses" in GHMC 17.48.070 means only more than one of the "listed uses" from the general parking calculation ordinance, GHMC 17.72.030. Where there is no indication that this definition of "multiple uses" was intended by the city council, the plain meaning of the phrase controls, and a yacht club and

marina are plainly separate, and thus multiple, uses. Accordingly, the City's calculation of the necessary parking spaces is correct.

F. Conditional-Use Permit Subject to Conditions

Finally, the Stearnses contend that the city council erred in reversing the hearing examiner's grant of a conditional-use permit subject to certain conditions.

The definition of a "conditional use" is "a use . . . permitted only after . . . the granting of a conditional use permit *imposing such performance standards* as will make the use compatible with other uses in the same district." GHMC 17.04.260 (emphasis added). The Stearnses contend that "imposing such performance standards" is synonymous with "imposing conditions." Further, the Stearnses cite the chapter of the Gig Harbor Municipal Code dealing with conditional uses, specifically the provision on "Procedure," GHMC 17.64.020(C), which provides: "Granting or Denial. The decision may include special restrictions or conditions deemed necessary or desirable in furthering the intent of the ordinance pertaining to the proposed development." GHMC 17.64.020(C).

While this provision seems to explicitly provide for granting conditional-use permits subject to conditions, what the code gives with one provision it takes away with the next.[9] Or more accurately, two provisions later,

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[9] The Stearnses cite only one case, *State ex rel. Standard Mining & Development Corp. v. City of Auburn*, 82 Wn.2d 321, 510 P.2d 647 (1973). The case is cited for the proposition that

in the section dealing with "Review Criteria," GHMC 17.64.040 provides:

> Each determination granting or denying a conditional use permit shall be supported by written findings of fact showing specifically wherein all the following conditions are met:
>
> . . . .
>
> D. That the site is of sufficient size to accommodate the proposed use and all yards, open spaces, walls and fences, *parking*, loading, landscaping and other features as are required by this title or as needed in the opinion of the examiner.

GHMC 17.64-040(D).

Where general and specific laws address the same subject matter, the specific law applies to the exclusion of the general. *Medical Consultants Northwest, Inc. v. State*, 89 Wn. App. 39, 49, 947 P.2d 784 (1997), *review denied*, 136 Wn.2d 1002 (1998). Therefore, since the GHMC 17.64.040 requires specific findings that a site is of "sufficient size to accommodate . . . all . . . parking," and the hearing examiner found that "[t]he site, while large for the Waterfront Millville District is not of adequate size to accommodate code required parking for all the uses within the

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"conditions can properly be imposed on conditional use permits." While the case does certainly indicate that an administrative body has the inherent power to condition the granting of conditional-use permits, nothing in the case stands for the proposition that such inherent powers cannot be limited through an express legislative act, as appears to have been done by the Gig Harbor City Council in this case. *See* discussion below.

structure proposed," the conditional-use permit could not be issued with a condition relating to parking.

The city council properly reversed the hearing examiner's grant of the conditional use permit.

G. Comprehensive Plan; Height Requirements

The Stearnses maintain that the City failed to provide sufficient factual findings and legal conclusions to allow for meaningful judicial review of the two alternate grounds for denial of the site plan: (1) that the site plan did not meet criteria for "medium usage" so as to be consistent with the comprehensive plan; and (2) that the site plan did not provide public viewing amenities to justify a departure from relevant height limitations in the GHMC. Because we have held that the City properly denied the Stearnses' application because of inadequate parking, we need not address these issues.

In conclusion, we affirm the trial court regarding the substantive LUPA appeal and the constitutionality of RCW 4.84.370, but we reverse the award of attorney's fees based upon a frivolous § 1983 claim.

/s/ Armstrong, J.
Armstrong. J.

We concur:

/s/ Bridgewater, C.J.
Bridgewater, C.J.

/s/ Hunt, J.
Hunt, J.,